



## JUNGE WISSENSCHAFT IM ÖFFENTLICHEN RECHT

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Kategorien:

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Kommentare: **II**

Keine  
Kommentare von PAULINA STARSKI

Tags:

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In spite of all the EU-criticism to be heard – a sad highlight was *Krystyna Pawłowicz*, a *Sejm* representative of PiS, who declared the flag of the European Union a “dirty rag” – the Polish people are sensitive to all signals coming from

official and unofficial EU channels. It is clear even to PiS that Poland depends on the EU – not only in economic but even more in security issues (Russia). Still the Polish government seems to test how far it can go. It is exactly this attitude that makes a strong EU reaction essential. From that perspective a more than legitimate “saber-rattling” with Art. 7 TEU makes also sense in diplomatic terms.

### Sensitivity to outside pressure?

The first sign that the Polish government is not immune to outside pressure came after the First Vice-President of the Commission *Timmermans* sent a very decisive [letter](#) to the Polish Minister of Foreign Affairs on 23<sup>rd</sup> Dec stating that he expected that the amendment bill on the Statute of the Constitutional Tribunal of 22<sup>nd</sup> Dec was “not finally

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adopted or at least not put into force.” As we know, Warsaw did not follow his demand but signs of appeasement surfaced: On the same day the Minister [requested](#) the Venice Commission (Council of Europe) to examine the first two PiS proposals (of [2<sup>nd</sup> Dec/15<sup>th</sup> Dec](#)) for amending the Act on the Constitutional Tribunal. This request for examination, however, seemed to be a mere move to distract, as [Tomasz Konciewicz](#) excellently evidenced, since the proposals submitted were superseded by the 22<sup>nd</sup> Dec amendment statute (see previous [blog](#)). But EU-wide outrage remained constant and effective: On 31<sup>st</sup> of Dec the Foreign Minister finally [submitted](#) the statute of 22<sup>nd</sup> Dec for review by the Venice Commission. Pressure seems to work.

## What about the “nuclear option” of Art. 7 TEU?

One of the most effective measures in order to put pressure on the Polish government seems to be the “saber-rattling” with the - as [Barroso](#) called it once - “nuclear option” of Art. 7 TEU. The Commission will deliberate on the initiation of the Art. 7-mechanism on 13<sup>th</sup> Jan. This provision evidences - together with Art. 2 TEU - the constitutional character of the EU treaties and the idea of the EU as a “community of values”. It was created for cases where a Member State departs from the European value canon that it had to abide by at the moment of its accession (Art. 49 TEU), hence endangering EU-wide homogeneity (see also [COM \(2003\) 606 final](#)).

The Art. 7-procedure is composed of three steps: Art. 7 (1) establishes the so-called “early warning-mechanism” which allows the Council - acting on a reasoned proposal of one-third of the Member States, of the Commission or the European Parliament - to determine by a majority of four-fifths that there is a clear risk of a serious breach by a Member State of the core values of the EU. It is in the Council's discretion to combine this declaratory finding with specific recommendations. A “clear risk” requires a high probability that a Member State will infringe the core values in the near future. Art. 7 (2) takes the mechanism one step further: It allows the Council to determine a serious breach of these values. While this finding is likewise declaratory in nature, it allows the Council to decide in a third step, acting by a qualified majority, according to Art. 7(3) TEU to

suspend certain rights of Member States in question. This includes the voting rights in the Council – hence the term “nuclear option”.

Until now neither the preventive nor the sanctioning mechanism has been applied. But they have been seriously considered in several cases: Art. 7 was brought into the discussion after the FPÖ obtained 27% of the votes in the Austrian general elections. In the end it was not activated, but bilateral sanctions were imposed. Other occasions where Art. 7 TEU was discussed include the expulsion of Roma in France in 2010, the constitutional reforms in Hungary under the reign of *Fidesz* and *Orbán* as well as the dispute between the President *Basescu* and Prime Minister *Ponta* in Romania both in 2012. In all cases the Council refrained from activating Art. 7. Several factors account for this: First of all, Art. 7 gives discretion to the competent bodies. Secondly, the terms Art. 7 operates with are highly ambiguous. Furthermore, the majorities that have to be met constitute high hurdles. Many states are reluctant to activate Art. 7 out of fear it might be used against them. This does, however, not diminish its effectiveness as a tool of pressure. In the current Polish crisis even Hungary did not oppose the Commission's Art. 7-deliberations to take place on Wednesday.

## Could Art. 7 TEU be activated in view of the Polish constitutional crisis?

The answer can only be yes: There is (at least) an imminent danger that two core values protected by Art. 2 TEU, rule of law and democracy, will be infringed. The rule of law is questioned in its substance by the PiS government's move against the Constitutional Tribunal, democracy is severely endangered by the [statute](#) passed on public media corporations on 30<sup>th</sup> Dec.:

As far as the paralysis of Constitutional Tribunal is concerned: Obviously the existence of a constitutional court is not an absolute command of the rule of law. Not all EU Member States have a constitutional court. The Netherlands and the United Kingdom manage without and Denmark, Luxembourg and Ireland have a very weak constitutional “judiciary” which is a part of a Supreme Court as the highest court of appeals. Still nobody would regard this problematic from the perspective of the rule of law. But does this matter? No, it does not. The Polish constitutional crisis is not about the question of whether a constitutional

court is needed or not. It is about the disempowerment of a court which is explicitly enshrined in the constitution by ways of ordinary statutes that are deliberated and adopted in procedurally dubious ways.

With regard to PiS' media strategy: The bill in question has transformed public broadcasting corporations into mere extensions of the government. While it is true that the influence of governmental parties on the media landscape in Poland is not entirely new – which is alarming enough –, the recent legislative move is unprecedented. The new statute allows the Minister of the Treasury together with another member of the government to decide upon the fate of the directors of the public media corporations and news agencies. They can terminate the directors' terms and appoint successors with immediate effect. Pluralism and democratic rule are hardly possible under such circumstances. Understandably alarmed by this *Timmermans* sent a [letter](#) asking the Polish government to justify its media law in light of Art. 2 TEU and Art. 11 of the Charter of Fundamental Rights. Not only did his letter remain unresponded, President *Andrzej Duda* meanwhile signed the media reform bill becoming effective on 8<sup>th</sup>

## Will Art. 7 TEU be activated?

Probably not. *Jean-Claude Juncker*, President of the EU Commission, urged on Jan. 7<sup>th</sup> – on the same day President *Duda* signed the highly problematic media bill - not to "overdramatize" the crisis in Poland. He went on: "Poland is an important and a full member of the EU. We are at the beginning of the procedure. Now we are in discussion with Poland and I don't want to speculate about further consequences. I don't think we will come to that point." (cited by [AFP](#)). It is to assume that this result can only be accomplished if the threat with Art. 7 TEU remains convincing.

## Latest Development: The next round of the battle between the Constitutional Tribunal and the government called off

Until recently it was expected that we would witness another round of the battle between the Tribunal and the government right before the Commission's deliberations on the 13<sup>th</sup>. The President of the Constitutional Tribunal,

*Rzepliński*, announced that on Jan 12<sup>th</sup> the Tribunal would issue an opinion on the constitutionality of the amended election procedure to the Tribunal and this way effectively on the election of five Tribunal judges by the PiS majority in December (on this see blogs by [Anna Śledzińska-Simon](#), [Arkadiusz Radwan Tomasz](#) and [Tadeusz Koncewicz](#)). The government has argued that the Tribunal would have to adhere to the new procedure in rendering the opinion. *Rzepliński*, however, originally made clear that the Tribunal would decide based on the Act on the Constitutional Tribunal in its unamended version applying the pre-reform quorum and sitting in its pre-reform composition (without the participation of the five PiS judges). A real power play was to be expected. Jarosław *Kaczyński*, now president of the PiS party, commented on the original move of the Tribunal: "In my personal opinion, I would treat this as his [*Rzepliński's*] resignation from the ... tribunal." (cited by [EUObserver](#)). Possible reactions taken into consideration by the government ranged from disregarding the ruling as a mere private opinion of the judges without a legal base over the initiation of disciplinary proceedings (which is in the competence of the President and the Minister of Justice according to the new Tribunal Act) to measures of criminal law against *Rzepliński* should he in any way hinder the five PiS judges from participating in the proceeding. On Friday the Tribunal, however, called off the announcement of the opinion (see [press announcement](#)). This has probably to be seen as a result of the [consultations](#) between President *Duda* and *Rzepliński* that took place last week. *It is only to hope that Rzepliński's move is not a sign of an incremental capitulation of the Tribunal in light of government pressure.*

The Commission can only be called upon to find the necessary sharp words for the disempowerment of the Tribunal on Jan 13<sup>th</sup>. In this context it is essential to see that the attack on the Constitutional Tribunal marks only the beginning of a systematic reconfiguration of the political order in Poland and a "gleichschaltung" of all units of authority by PiS without any respect for the constitution. It is by no means exaggerated to fear what is next to come... Since it was so essential for PiS to paralyze the Constitutional Tribunal one does not have to be a prophet to assume that the legislative moves yet to come will likely be constitutionally more than problematic. A more adequate case for "saber-rattling" with Art. 7 TEU is hardly imaginable.

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Frederik Ferreau zum Stadthallenfall von Wetzlar: warum Wetzlar gegen den Rest der (Gerichts-) Welt weitreichende Folgen hat.  
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von FREDERIK F...  
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29. März 201

